No. 22655

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
For the Use and Benefit of
C. H. BENTON, INC., a California
Corporation,

Plaintiff and Appellant,

vs.

ROELOF CONSTRUCTION COMPANY,
doing business as TRUETT PAINTING
COMPANY; and FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

Defendants and Appellees.

On Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This was an action under the Miller Act (40 U. S. C. 270b) for materials furnished within the Southern District of California for the performance of a contract with the United States Government on government buildings (Complaint Paragraphs I and III, Pre-Trial Stipulation and Order Paragraphs I, II and III) and jurisdiction is exclusively within the United States District Court for that district under the provisions of Subdivision b of 40 U. S. C. 270b.

Jurisdiction of this Court to hear this appeal is based upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

Roelof Construction Company was the prime contractor in painting some United States Government buildings (Bayview-Cabrillo housing), (Pre-Trial Stipulation and Order Paragraph IIIa). Use plaintiff, Benton, supplied $31,441.72 worth of paint for this job (Pre-Trial Stipulation and Order Paragraph IIIc). Benton claimed it was still owed $4,983.09 for this paint (Pre-Trial Stipulation and Order Paragraph IIIe). Defendants admitted that Roelof owed Benton more than this amount, but claimed that certain payments that had been credited to other jobs should have been applied to this job and that, therefore, this job was fully paid (Pre-Trial Stipulation and Order Paragraph IIIe). Fidelity and Casualty Company furnished Roelof's bond as required by 40 U.S.C. 270a (Pre-Trial Stipulation and Order Paragraph IIIb).

SPECIFICATION OF ERROR

The Trial Court clearly erred in its express finding that: "There is no question but that Benton was aware of the source of funds (which Benton received from Roelof) and should have applied such funds to the bonded jobs and not to the other due accounts", and in the implied finding that the source of such funds was the money paid by the United States Government to Roelof for the painting which it performed on the Bayview-Cabrillo housing job.

SUMMARY OF ARGUMENT

There was no evidence whatsoever that <u>any</u> of the money which Roelof paid Benton found its source in the Bayview-Cabrillo housing job and no evidence whatsoever that Benton had any knowledge that the Bayview-Cabrillo housing job was the source of <u>any</u> of the funds that it received.

There was also no evidence from which any inference could be drawn that this job was the source of any funds that Benton received and credited to other jobs or that Benton had any knowledge of the source of the funds that it received from Roelof.

FACTS AND EVIDENCE

As previously stated, this case arose out of the furnishing of paint for a government contract NBY 69866 for the repainting of buildings at Cabrillo and Bayview housing located within the Southern District of California (Paragraph I of the Pre-Trial Stipulation and Order).

The paint was, in fact, so furnished and used (Paragraph IIa of Pre-Trial Stipulation and Order) and defendant, Fidelity and Casualty Company of New York, furnished the bond as required by 40 U. S. C. 270a (Paragraph IIb of the Pre-Trial Stipulation and Order). The total cost of this paint was $31, 441. 72 (Paragraph IIc of the Pre-Trial Stipulation and Order). Use plaintiff, Benton, claimed that $4, 983. 09 of this was unpaid and defendants admitted that they owed Use plaintiff more than this amount, however, they contended that this particular bill was paid and that payments that Roelof had made were improperly credited to other jobs (Paragraph IIe of the Pre-Trial Stipulation and Order). The only issue in this case was whether certain payments made by Roelof to Benton were improperly credited to other jobs so that Use plaintiff had been paid in full for the paint used on the Bayview-Cabrillo job (Paragraph IId of the Pre-Trial Stipulation and Order).

EVIDENCE CONCERNING THE PAYMENTS

The first invoice on the Bayview-Cabrillo job is number 135862 dated August 24, 1965 in the amount of $65.48 (Plaintiff's Exhibit 1) and at that time defendant, Roelof, owed Use plaintiff, Benton, $5,025.93 on open account (Plaintiff's Exhibit 2).

Charges were made and payments were credited on this open account, without regard to the job involved, until November 4, 1965, at which time Use plaintiff began to note on its ledger the particular job for which charges were made (Plaintiff's Exhibit 2) because Roelof was falling behind (Rep. Tr., p. 6, ll. 9-20) in their payments.

According to Roelof's own records (Defendants' Exhibit G) Roelof paid the September account in full on November 18, 1965, by check no. 322 for $6,259.41, (a prior payment on the September account was made October 2, 1965 by check no. 275 for $2,768.35 marked "invoices"). It paid the October account in full on December 22, 1965 by check no. 369 for $7,028.02, and marked "Roelof Construction a/c". It paid the November account in full on January 20, 1966 by check no. 409 for $5,789.40 and it paid $5,000.00 on the December account by check no. 477 on February 17, 1966. There was no testimony whatever by any witness as to the source of the funds used to make any of these payments.

Benton's ledger shows that each of these payments was credited in the same manner as shown on Roelof's records (Plaintiff's Exhibit 2) (that is an open account) and there was no controversy during the trial as to whether or not any of these payments were correctly credited.

The next payment was made on April 18, 1966 by check no. 573 for $2,000.00 and since it was intended to be credited on the Bayview-Cabrillo job (Defendants' Exhibit K) and was so credited (Plaintiff's Exhibit 3), there can be no controversy about this payment. Its source was not disclosed by any testimony or evidence.

The next payment was for $2,000.00 by check no. 619 on May 16, 1966 and, although Roelof had marked it as being only partially made on the Bayview-Cabrillo job (Defendants' Exhibit K), it was credited in its entirety to this job (Plaintiff's Exhibit 3). Its source was likewise not disclosed by any testimony.

The next payment was made on May 20, 1966 in the amount of $3,166.00 and Roelof's Vice President, Truett, testified that Roelof intended all of it to be credited on the Bayview-Cabrillo job. (Rep. Tr., p. 61, ll. 13-17 and Defendants' Exhibit K). Benton was not informed of this intent, however (Rep. Tr., p. 59, ll. 10-17). Benton credited it entirely to the Vacation Village job (Plaintiff's Exhibit 2). Truett testified that the source of the funds for this particular check was a joint check "from the Vacation Village People" (Rep. Tr., p. 63, ll. 18-20 and p. 65, ll. 4-7). However, he said that he thought Benton could credit it "any way" (Rep. Tr., p. 64, ll. 18-23).

Benton gave Roelof a lien release on this Vacation Village job dated May 5, 1966 (Plaintiff's Exhibit 7), the date of its delivery is not disclosed by the evidence.

The next credit shown on Plaintiff's Exhibit 2 is for June 6, 1966 in the amount of $768.18, credited to "North Island" and is for the exact amount of the invoices on this job. No controversy appeared to exist regarding this credit and the

check is not included in Defendants' Exhibit H. There was no testimony regarding the source of the funds used to make this payment.

The next payment is for $708.56 on June 7, 1966 and is credited to "Brown 6618" and a notation on the May bill (Part of Defendants' Exhibit G) shows that the Brown bill was paid June 3 by check no. 641. (This check was not included in Exhibit H either). Apparently there was no controversy about this check and there was no testimony as to the source of the funds used to make this payment.

The next payment was June 15, 1966 by check no. 673 in the amount of $3,100.00. This check states on its face that it is for the Hanalei Hotel, "G. L. Cory job", and it was so credited (Plaintiff's Exhibit 2). There is a conflict in the evidence as to whether this was written on the check when Roelof issued it.

Truett testified and defendants' Exhibit K indicates that Roelof intended $2,162.64 of this June 15, 1966 check to be credited to the Bayview-Cabrillo job and that this, together with the May 20, 1966 check for $3,166.00, would pay that job off in full (Rep. Tr., p. 56, ll. 7-10 and p. 52, ll. 19-21). He admitted that Benton was not informed of this intent (Rep. Tr., p. 59, ll. 10-17).

There was no testimony whatever as to the source of the funds used to make this payment.

About June 22, 1966, Truett requested a lien release on the Hanalei job (Rep. Tr. p. 12, l. 23, p. 13, l. 1 and p. 46, ll. 11-14), a conference was held between Charles Benton, William Benton, Truett and (Ralph) Roelof (President of Roelof Construction Co.) at which time Benton demanded that they receive some money (Rep. Tr., p. 13, ll. 2-6) which they received (Rep. Tr., p. 13, ll. 7-8).

Charles Benton was not sure of the amount but Plaintiff's Exhibit 2 shows that there was a $2,000.00 check (no. 563, Defendants' Exhibit H) credited to the Hanalei job on June 22, 1966 (there appears to be no contention that this was improperly credited). There was no testimony as to the source of the funds paid by this check, although there is a reasonable inference that it came from G. L. Cory on the Hanalei job since Charles Benton testified that Cory promised to advance Truett enough money to pay Benton's material bill and that he did do so. (Rep. Tr., p. 18, ll. 18-24) (Defendants' Exhibit L also shows a $2,000.00 credit on Hanalei without date).

Benton also demanded and received two assignments (Defendants' Exhibits B and C) for $3,300.00 due from Golden Construction Company on the Vacation Village job and one for approximately $1,100.00 due from Charlie Brown on the Hanalei Hotel job and a promissory note for $5,736.98 (Defendants' Exhibit A).

Upon receipt of these, Benton gave Roelof the lien release (Defendants' Exhibit D) on the Hanalei job (Rep. Tr., p. 47, ll. 6-10).

Charles Benton testified that the Roelof note covered the completed jobs, including Bayview-Cabrillo (Rep. Tr., p. 16, l. 2 to p. 18, l. 1 and p. 75, ll. 18-24), and see Plaintiff's Exhibit 4, together with the explanation that the red "N"'s indicated the jobs that were included in the note (Rep. Tr., p. 15, ll. 11-14). He also testified that Plaintiff's Exhibit 4 was present when the conference was held with Truett and Roelof regarding the Hanalei release and that he believed it was shown to Truett (Rep. Tr., p. 15, ll. 15-22), that the whole matter was thoroughly discussed by all four of them (Rep. Tr., p. 74, l. 15 to p. 75, l. 24) and that he gave Truett a breakdown of the amount at that time (Rep. Tr., p. 10, ll. 1-6). This testimony

was corroborated by William Benton (Rep. Tr., p. 69, l. 19 to p. 70, l. 25).

Truett testified that there was no discussion as to what the note was for (Rep. Tr., p. 41, ll. 12-16) that "it was a discussion", that the note was for the balance owed Benton or just about all the balance due with the two assignments (Rep. Tr., p. 43, l. 24 to p. 44, l. 23). No particular jobs were specified, (Rep. Tr., p. 50, ll. 5-8) that he had no reason to assume that we were even discussing Cabrillo "because, according to my credits on my books, we didn't owe anything on the Cabrillo job" (Rep. Tr., p. 42, ll. 1-6). However, he had no knowledge today of what the breakdown is in the promissory note, except for what he heard Charles Benton testify to (Rep. Tr., p. 34, ll. 4-10).

In connection with this discussion, Charles Benton testified that the assignments were taken mainly for the Hanalei job (Rep. Tr., p. 75, ll. 14-17) (at that time the balance due on this job, according to Benton's ledger, was $4,643.91).

Although G. L. Cory, the general or prime contractor, on the Hanalei job, had assured Benton that he would advance Truett enough money to pay Benton's material bill, which he did (Rep. Tr., p. 18, ll. 18-24), whether or not Benton ever received any of this money was not shown because of defendant's objection (Rep. Tr., p. 27, l. 24 to p. 29, l. 16). However, as has been pointed out, there is a reasonable inference that Benton received $2,000.00 of it.

Benton received $1,018.00 from the Charlie Brown assignment by joint check on July 22, 1966 (Plaintiff's Exhibit 6) (Roelof's check for this (no.717) also included $742.23 for Ft. Defiance (Defendants' Exhibit A)) and $3,300.00 from a joint check from Vacation Village in the amount of $3,469.00 (Plaintiff's Exhibit 5)

on July 28, 1966. The difference is because Benton let Roelof keep $169.00 of this check (Rep. Tr., p. 21, ll. 15-24).

The $1,018.00 was credited to the Hanalei job as indicated on the check no. 717, and the $3,300.00 was credited: $429.40 to "Vacation Village", $156.19 to "Brown 6618" and $2,714.37 to "Hanalei" (Plaintiff's Exhibit 2).

ARGUMENT AND AUTHORITIES

As previously stated, it was stipulated that the only issue in this case was whether payments made by Roelof to Benton were improperly credited by Benton to other jobs instead of the "bonded job" (Bayview-Cabrillo) and as to this issue defendants had the burden of proof, Desjardins vs. Desjardins, 308 F.2d 111 at 116, Central California Commercial College vs. Shrewsbury, 150 Cal. App. 2d 203. Two categories of payments are involved, they are:

1. Payments made before May 20, 1966, which were not specifically allocated on Benton's ledger;

2. Payments made after May 20, 1966, all of which were specifically allocated on Benton's ledger to jobs other than Bayview-Cabrillo.

While there was evidence that two other jobs were separately billed and paid (Rep. Tr., p. 38, l. 17 to p. 41, l. 11, and Defendants' Exhibits I and J), there is nothing in the testimony that would relate either of these jobs or the payments made on them to this controversy and nothing at all about the source of the funds used to make these payments (both of which were made after May of 1966).

Clearly, those payments in category 1 made on January 20, 1966, February 18, 1966, April 18, 1966 and May 16, 1966 were credited on the Bayview-Cabrillo

job (Plaintiff's Exhibit 3). These total $14,789.40.

Since the total job cost was stipulated to be $31,441.72, it necessarily follows that $11,669.23 of other payments in category 1 were credited to the Bayview-Cabrillo job ($31,441.72 minus $14,789.40 and $4,983.09 [the balance claimed to be unpaid] equals $11,669.23).

Defendants claimed at the trial and attempted to prove that since they had intended certain payments in category 2 to be credited the Bayview-Cabrillo job, Benton's failure to so credit them was improper, even though they never informed Benton of this fact (Rep. Tr., p. 59, ll. 10-17), and although at least one of these payments was by joint check on another job which Benton could not lawfully apply to the Bayview-Cabrillo balance (Edwards vs. Curry, 152 Cal. App. 2d 756), although Truett apparently was not aware of this (Rep. Tr , p. 64, ll. 18-21).

Defendants never contended that the source of any of the payments that Benton received from Roelof was a payment from the United States Government on the Bayview-Cabrillo job and there is not one word of testimony throughout the entire trial as to how much money Roelof received from the United States Government for the Bayview-Cabrillo job or when it was received (except that the "final" payment was in May of 1966) or what was done with it.

For some reason the Trial Court completely disregarded the question raised by defendants (whether Benton was wrong in not crediting the payments from Roelof in the same manner as Roelof secretly intended them to be credited) and instead found that "Benton was aware of the source of funds and should have applied such funds to the bonded jobs and not to other due accounts".

There was no finding as to what "source of funds" the Court was talking about or which particular payments the Court was referring to as "such funds". However, it seems clear from what the Court said prior to this finding that the Court believed that some of the funds that Benton credited to other jobs had their source in the "bonded job" and that Benton was aware of this fact.

In effect, the Trial Court made two findings:

1. An implied finding that the source of some of the payments that Benton received from Roelof was money received from the United States Government in payment of the Bayview-Cabrillo contract.

2. An express finding that Benton was aware of the source of these payments and, nevertheless, credited these payments to "other due accounts".

Appellant proposes to demonstrate conclusively that neither of these findings has any support whatever in the evidence.

Since the Court failed to specify exactly which payments it was referring to, it is necessary to examine all of the payments to determine whether there is any evidence whatever to support either of these findings.

Since there was no direct evidence that any payment found its source in the "bonded job", the first question is whether there is any evidence from which it might be inferred that any of them did.

The only testimony regarding the receipt of any money on the "bonded job" was that of Truett (Rep. Tr., p. 42, ll. 7-25) that Roelof had been paid off completely and that their "final payment" was "probably around" May of 1966 (the last invoice for paint on the Bayview-Cabrillo job was No. 140456 dated April 7, 1966,

Plaintiff's Exhibit 1).

From this testimony, it might easily be inferred that sometime in May of 1966 Roelof received some money on the "bonded job" and that any payments to Benton in May of 1966 may have come from this source.

There were, in fact, two payments in May of 1966, one of May 16, 1966 in the amount of $2,000.00 and one on May 20, 1966 for $3,166.00. However, since the first of these was applied to the "bonded job" (Plaintiff's Exhibit 3) and the second came by joint check from "the Vacation Village People", niether of these could possibly be said to have been wrongfully applied.

Can we infer that any other payments found their source in the "bonded job"?

Since Truett used the word "final" in describing the May payment, it might be inferred that Roelof received some money from the "bonded job" before May of 1966, but when and how much is completely unknown. Equally unknown is what other additional funds Roelof had or received while the job was in progress, as well as what other obligations Roelof had during that time.

It has already been pointed out that all of the payments in category 1 between the December 22, 1965 payment and May 20, 1966 were applied to the "bonded job".

Is there any basis on the testimony at all for an inference that Roelof received any money whatsoever on the "bonded job" on or before December 22, 1965? The answer is clearly NO.

How about the payments after May 20, 1966? If Roelof was paid in full in May of 1966, none of the payments after that date could have found their source

in the "bonded job" either, and this includes all of category 2 payments, except the $3,166.00 payment of May 20, 1966, the source of which was the "Vacation Village People".

There was, therefore, no basis whatsoever for any inference that any payment whose source was the Bayview-Cabrillo job was credited to any other job.

Turning now to what Benton knew about the source of the funds that it received, there is again no direct evidence that it had any knowledge whatsoever as to the source of the funds that it received.

Is there any basis whatsoever for an inference that it had such knowledge?

There is not one word of testimony that anyone told Benton anything at all that might have given it the slightest reason to suspect that the source of any of the funds that it received was from the "bonded job".

The only thing that Benton did know was that Roelof had a Government contract, that Roelof was getting behind and that it did occasionally receive some money. There is no testimony that Benton was told or knew that Roelof was getting progress payments of some kind (if it, in fact, was) from the "bonded job" and nothing to cause Benton to suspect that such was the case, in fact, quite the contrary.

Benton received no payments whatever between February 18, 1966 and April 15, 1966, and during this time, and for some time previous, all of the charges were for the Bayview-Cabrillo job. This could easily have led Benton to suppose that Roelof was not getting any progress payments, that the payments it had previously received came from other jobs, and that it would be paid for Bayview-Cabrillo when the job was complete and Roelof received payment from the Government.

Additionally, the payments that Benton received in October and November of 1965 were the exact amount of the September billing, December's payment was in the exact amount of the October billing and the January payment was in the exact amount of the November billing (see Plaintiff's Exhibit 2 and Defendant's Exhibit G), which would certainly have led Benton to believe that this was how Roelof expected these payments to be credited (which is exactly what Roelof did intend).

Is it these payments which the Trial Court considered to have been wrongfully applied? If so, there would seem to be no basis upon which Benton could possibly have suspected this at the time that it received them. If not, then what payments were wrongfully applied? Certainly not the ones received after Roelof had been "completely paid off". Yet all of the other payments were credited to the "bonded job".

It would seem conclusive that not only was the Trial Court clearly in error but that there was no evidence whatsoever to support the Trial Court's findings (either express or implied) and that the judgment must be reversed, Controller of California vs. Lockwood, 193 F.2d 169 at 172, James Julian Inc. vs. President & Commissioners of Town of Elkton, 341 F.2d 205 at 209, and Los Angeles Trust Deed & Mortgage Exchange vs. S.E.C., 264 F.2d 199 at 208.

This brings us to the question of whether there is any basis at all for any judgment other than one for the Use plaintiff as prayed for.

The two other grounds for deciding the case in defendant's favor, which the Trial Court discussed (but did not decide), were:

1. Whether Roelof's uncommunicated intent that certain payments were to be credited to the Bayview-Cabrillo job (even though one of them was by joint check from the "Vacation Village People") was binding on Use plaintiff?

It is respectfully submitted that it was not and that, as Use plaintiff contended, it was free to apply the payments as it did. Standard Surety & Casualty Co. vs. U. S. for Use and Benefit of Campbell, 154 F. 2d 335 at 337 and California Civil Code, Section 1479.

2. Whether the taking of the note presumptively caused injury to the bonding company?

This question has already been answered in the negative, U. S. Fidelity & Guaranty Co. vs. U. S. for Use of Griscom-Spencer Co., 178 F. 692 at 694.

Therefore, it is respectfully submitted that the judgment should be reversed with instructions to enter judgment for Use plaintiff as prayed for.

Respectfully submitted,

/s/ DAVID S. FOLSOM

Attorney for Plaintiff and Appellant.

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ DAVID S. FOLSOM